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In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF LAWTON, OKLAHOMA, et al.,
Petitioners,

v.

SOLOMON LUSBY, et al.,
Respondents.

T.G.&Y. STORES, INC.,
Petitioner,

v.

SOLOMON LUSBY, et al.,
Respondents.

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JACK L. KINZIE
GRETCHEN A. HARRIS *
of
ANDREWS DAVIS LEGG BIXLER MILSTEN & MURRAH
500 West Main
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-9241
and
LINDA G. SCOGGINS
of
SPRADLING, ALPERN, FRIOT & GUM
101 Park Avenue, Suite 700
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-0211
Attorneys for Respondents

June, 1985

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether substantial evidence of various conscious, articulated municipal policies, including a policy of non-investigation of shoplifting complaints prior to arrest, supported the jury verdict that the City of Lawton was liable for the false arrest, incarceration and continued seven month prosecution of innocent private citizens?

2. Whether substantial evidence of compliance with the notice provisions of the Oklahoma Political Subdivision Tort Claims Act permitted the submission to the jury of pendent state claims of false arrest, assault and battery, and malicious prosecution against the City of Lawton and Officers Steven Wertz and Kent Dunegan?

3. Whether the introduction of substantial evidence of T.G.&Y. Stores, Inc.'s concerted action with the City of Lawton and its own independent action in bringing about the false arrest, incarceration and continued seven month prosecution of innocent private citizens supported the jury verdict which was expressly premised on articulated findings of violations of both federal and state law?

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COUNTERSTATEMENT OF THE CASE

Because both petitioners' statements fail to completely articulate the evidentiary bases on which the jury verdict and appellate review were premised, respondents provide this statement of the case.[1]

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[1] References to the Record on Appeal will be identified by (ROA _____). References to the trial transcript will be identified by (Tr. _____).

On July 6, 1979, Vaughn, Solomon and Alvin Lusby (collectively "the Lusby brothers") were enroute to Oklahoma City from Lawton, Oklahoma, when they stopped at a T.G.&Y. Stores, Inc. store ("T.G.&Y.") located on Sheridan Road in Lawton to purchase a pair of sunglasses for Vaughn. Once inside the store, Vaughn selected a pair of sunglasses, went through the checkout stand with his brother Alvin, paid the cashier for the sunglasses and proceeded to wear the sunglasses. Immediately after going through the checkout area Vaughn decided to purchase some hair spray before leaving the store. He circled back around the checkout area, selected the hair spray and, carrying the sunglasses, went back to the same cashier and paid for the hair spray. He then proceeded out the door of the store. (Tr. 18-21). David Jamison, an assistant manager at the store, saw Vaughn pass through the checkout line the second time, carrying the sunglasses but not paying for them. Jamison summoned Charles Gent ("Gent"), an off-duty City of Lawton police officer employed by T.G.&Y. as a plainclothes security guard, to investigate.

Gent stopped Vaughn outside the store and asked him if he had a receipt for the sunglasses. Vaughn explained that he had paid for the sunglasses but that he did not have a receipt. Gent showed Vaughn his Lawton Police Department badge, told him he was a Lawton police officer working as a security guard and that Vaughn was under arrest for shoplifting. (Tr. 23-25). Vaughn immediately suggested they go back inside the store to clear up the matter. (Tr. 22-25). It was Vaughn's desire and intention to have Gent speak with the cashier so that she would have an opportunity to vouch for the fact that he had indeed paid for the sunglasses while it was fresh in her mind. However, once inside the store, Gent refused to ask the cashier if Vaughn had paid for the sunglasses and insisted that Vaughn go directly to a back room of the store. (Tr. 26-29). When Vaughn hesitated and raised his voice in

an attempt to get the attention of the cashier, Gent grabbed him around the throat using a chokehold. Then two other employees of T.G.&Y. each grabbed one of Vaughn's arms and assisted Gent in pinning Vaughn.

As Vaughn and Gent were going back into T.G.&Y. from the parking lot, Alvin Lusby was informed by Gent that he had arrested Vaughn for shoplifting. Alvin knew one of the managers of the store and immediately proceeded to another area of the store to seek his assistance in clearing his brother. In the meantime, Solomon Lusby came back in the store to see what was taking his brothers so long. He was totally unaware of the events which had taken place between Vaughn and Gent. (Tr. 196, 197, 361).

As Solomon entered the store one of the first things he saw was his brother Vaughn with three strange men holding him down. One of the men, whom he later learned to be Gent, had his brother around the neck in a chokehold and the other two men had hold of his arms. Solomon immediately went to his brother's aid. He struck Gent to get him off his brother and they struggled for a few seconds until two men, T.G.&Y. employees, grabbed Solomon to restrain him. As the men gained control of Solomon, Gent pulled a small pistol from his waist. (Tr. 34, 199-201).

About the time Gent pulled the pistol out and started waving it around, Alvin appeared back on the scene. There was undisputed testimony that as Gent was waving the gun around he struck at least one of the brothers in the head with the gun as he was being held by T.G.&Y. employees.

It was at the point that the pistol was being wildly waved about that it became quite obvious to Vaughn that matters were getting out of hand. Vaughn had not tried to intervene while his brothers were being hit by Gent or held by the T.G.&Y. employees. He continued to try to get the situation under control. Vaughn

calmed the crowd and told his brothers and Gent to cool down, go in the back and talk about it. Vaughn was afraid the gun might accidently go off and injure someone. (Tr. 37, 630, 871, 872).

The Lusby brothers, Gent and perhaps another T.G.&Y. employee then proceeded to a back room in the store. In a few minutes two Lawton police officers, Steve Wertz and Kent Dunegan, arrived at the store and took the Lusby brothers into custody. (Tr. 44). Pursuant to the official, stated Lawton Police Department policy (Tr. 1219), no questions were asked and there was no independent investigation by the police officers. Officers Wertz and Dunegan picked up the Lusbys, handcuffed and frisked them, and took them to jail and put them in cells without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest them. They relied entirely on Gent's word to affect the arrest before he had even completed the citizen's arrest form. (Tr. 44-47, 638, 1484-87).

After the officers put the Lusby brothers in the patrol car, Alvin was able to move his handcuffs from behind his back to in front in order to relieve the pain in his shoulder. Alvin Lusby had requested that his handcuffs be placed in front because of an injured shoulder but his request was refused. (Tr. 46, 47). The fact that he had moved his handcuffs without approval of one of the officers obviously angered Officer Wertz when they arrived at the Lawton police station and he realized what had happened. (Tr. 53). There was evidence that Wertz intentionally and maliciously hit Alvin in the face with his fist and pushed him head first into a brick wall on the way into the jail area. (Tr. 53, 54, 219, 382). The testimony was reinforced by other evidence of Wertz' violent propensities as a police officer. (TR. 1101-1104, 1135-1192, 1200-1201). There was no evidence that Officer Dunegan took any action to stop the actions of Wertz.

Once in the jail area, the Lusby brothers were all subjected to strip searches. At the trial Wertz and Dunegan testified that the Lusby brothers were all strip searched because they found a roach clip among Solomon's personal possessions. (Tr. 1497, 1546). That testimony was contrary to their sworn answers to interrogatories which stated that the strip search was made because the officers had been told by someone from the T.G.&Y. store that one of the brothers had a large knife. (ROA 1498-99, Pl. Exh. 5). For whatever reason, all three Lusby brothers were strip searched. The justification for the strip searches was really unimportant as far as the Lawton Police Department was concerned because the Department had no policy concerning when a strip search was proper. That judgment was left totally to the discretion of the officer. (Tr. 1217, 1218).

The Lusby brothers were finally booked and charges filed against them for assault and battery, resisting arrest, disobeying a lawful order, shoplifting, possession of marijuana, and assault and battery on a police officer (Pl. Exh. 8, 9, 10) after Gent appeared at the station to fill out his arrest forms. (Tr. 637, 638). The brothers were released on bail after several hours in jail. Alvin immediately went to an emergency room to receive medical attention for his injuries. (Tr. 71, 390).

Seven months later, on February 27, 1980, the City of Lawton ("Lawton") dropped all charges against the Lusbys. (Tr. 657). For seven months Lawton never investigated the incidents charged against the Lusby brothers or, if it did, it left the charges pending despite overwhelming evidence that no shoplifting occurred. Further, there was overwhelming evidence that moments after the incident Gent and T.G.&Y. management knew that the cashier believed Vaughn had paid her for the sunglasses. However, during that seven month period, instead of dropping the charges Gent and T.G.&Y. bargained for a release of liability.

Lawton, through its city prosecuting attorney, also demanded from the Lusby brothers a release of civil liability before it would drop the charges. (Tr. 1361). This demand was articulated official policy; it was required of Larry Mallory, another arrestee beaten by Wertz, prior to the dropping by Lawton of charges filed against him. (Tr. 1189-90).

This case was filed on June 23, 1980. The trial began on September 16, 1981. The jury verdict in favor of the Lusby brothers was rendered on October 1, 1981. The Court of Appeals for the Tenth Circuit affirmed on November 23, 1984. On January 9, 1985, it denied rehearing and suggestions for rehearing en banc as no judge requested a poll for rehearing en banc.

REASONS FOR DENYING THE WRIT

I. LAWTON'S PETITION RAISES ONLY EVIDENTIARY ISSUES WHICH DO NOT WARRANT THIS COURT'S REVIEW.

A. The Question Of Liability Of Lawton Based On An Alleged Single Incident Was Not Presented To Nor A Basis For The Decision Of The Appellate Court And Is Not Properly Before This Court.

Lawton, in its petition, has for the first time attempted to characterize the factual scenario as a "single incident" and has framed its question presented in terms of whether this alleged single incident may be a predicate for municipal liability. However, the question whether the false arrests, incarceration and continued seven month prosecution could even be considered a "single incident" was not presented by Lawton to the appellate court nor was it a basis for the decision. Thus, the question is not properly preserved for review by this Court. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970); *Cf., City of*

Oklahoma City v. Tuttle, 53 U.S.L.W. 4639 (U.S. June 3, 1985) (single incident would be reviewed where presented to and directly decided by appellate court).

Moreover, Lawton's brief to the appellate court demonstrates that it never considered its liability to be predicated on a single incident. To the contrary, Lawton merely claimed on appeal the evidentiary insufficiency of numerous instances of police officer misconduct as one of the basis for its liability[2]. This evidence identified by Lawton was admittedly admissible as relevant to the question whether Lawton could be held liable for the actions of Officer Wertz in his assault and battery on Alvin Lusby. Lawton, on

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[2] Lawton framed its challenge on appeal as:

> THE COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT FOR THE CITY OF LAWTON. SINCE THERE EXISTS NO COMPETENT EVIDENCE SHOWING THE EXISTENCE OF AN OFFICIAL POLICY OR CUSTOM OF THE CITY WHICH CAUSE THE INJURIES ALLEGED UNDER 42 U.S.C. §1983.

"Brief for Appellants," City of Lawton at 20;

and further identified the numerous incidents it felt were insufficient:

> Turning to this appeal, the plaintiffs introduced seven instances of actions by police officers to establish policy or custom under §1983. They were:
>
> 1) Byron Lusby's testimony concerning an assault upon a juvenile at Marie Detty Tr. at page 986-988, lines 16-13;
>
> 2) Alford Hennessee's testimony of violence toward him at Tr. pages 1114-1120, lines 10-4;
>
> 3) Bill Hensley's testimony concerning an assault upon a prisoner at Tr. page 1102, line 17;
>
> 4) The Black cartoon incident Tr. at page 1213, line 12;
>
> 5) The deposition of Larry Mallory and Tony Tyson at Tr. pages 1135-1192;

appeal, implicitly recognized that its liability to all the Lusby brothers for the arrests and continued prosecution did not arise from a single incident but from a myriad of official policies and top-level official actions. Its inarticulate attempt to now assert the "single incident" question is wholly improper.

B. Lawton's Liability Was Not Predicated On A Single Incident; Its Mere Claim Of Evidentiary Insufficiency Does Not Warrant This Court's Review.

Lawton, in its petition, wholly fails to recognize that the predicate for its liability was not inferences to be drawn from a single incident, but substantial evidence of various conscious, articulated policies which, when carried out by Lawton officials, constituted a direct affirmative link to the constitutional deprivations suffered by the Lusby brothers. As the appellate court stated:

> The Lawton police department did not routinely investigate merchants' allegations of shoplifting before arresting suspects that the merchants designated. The Lawton police chief testified that his department had a policy of not conducting any independent investigation before taking a person into custody who has been made the subject of a citizen's arrest. In addition, the Lawton Police Department provided T.G.&Y. with special forms that the police prepared for merchants who detained suspected shop-

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[2] (Continued)

6) Eddie John Hargraves' testimony concerning Steve Wertz at Tr. page 769, lines 5-9; and

7) Robert Gillian's testimony concerning Sgt. Reynolds Tr. at page 1205, line 24.

"Brief for Appellants," City of Lawton at 27.

> lifters. These forms apparently allowed city police officers discretion to issue a summons to suspects when they arrived at the store, without taking the suspects to jail.
>
> That Officers Wertz and Dunegan adhered to this policy of no independent investigation is apparent from their testimony. They picked up the Lusbys, handcuffed and frisked them, and immediately took them to jail. They did not interview any witnesses or conduct any inquiry to determine whether probable cause existed to arrest. At the time Wertz and Dunegan took the Lusbys into custody Gent had not completed the citizen's arrest form. There is evidence that the city never investigated the incidents charged against plaintiffs, or if it did, that it left the charges pending despite overwhelming evidence that no shoplifting occurred. Therefore, the trial judge properly submitted to the jury the question of the City of Lawton's liability for a §1983 violation.

Lawton's App. B, pp. 31-32a of the Petition For A Writ Of Certiorari.

Moreover, uncontroverted evidence at trial established that Lawton, through its city prosecuting attorney, continued to demand for seven months a release of liability from the Lusby brothers as a condition for dropping the charges. This demand was standard operating policy for Lawton. These articulated official policies and their use against the Lusby brothers served as sufficient evidentiary predicate on which the jury could reasonably have found Lawton liable under 42 U.S.C. §1983. This evidentiary predicate does not conflict with *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and related cases, but is wholly congruent with them.

C. The Decision Of The Court Of Appeals Does Not Conflict With Decisions From Other Circuits.

Lawton attempts to argue that the appellate court's decision conflicts with other circuit court decisions disapproving municipal liability on the basis of a single, isolated incident. Because, as demonstrated in the appellate court's decision and in Part I.B., *supra*, the basis of Lawton's liability is not any inference which must be drawn from an isolated incident involving only a non-supervisory police officer but rather many conscious policies articulated and carried out by municipal decision-makers, including both the police chief and the city prosecuting attorney, those cases cited by Lawton are distinguishable on their facts and do not conflict with the decision of the appellate court sought to be reviewed here.

Moreover, a review of this Court's recent decision in *City of Oklahoma City v. Tuttle, supra*, demonstrates no conflict with the requirements for municipal liability articulated in that case. The various conscious, articulated municipal policies undeniably satisfy the mandate of the plurality that " 'policy' generally implies a course of action consciously chosen from among various alternatives." *Id.* at 4643. Because the evidence demonstrated that Lawton made the "conscious choice" to never (even after charges had been filed) make any independent investigation of the shoplifting arrests and to demand release of liability before the admittedly groundless charges were dismissed, the issue of municipal liability was properly submitted to the jury.

Furthermore, because the police chief and city prosecuting attorney who articulated and carried out the municipal policies which were affirmatively linked to the deprivations are, under the reasoning of *City of Oklahoma City v. Tuttle, supra*, "municipal decision-makers," *Id.* at 4642, the evidence adduced be-

low was clearly sufficient to support the jury verdict of municipal liability.

Finally, Lawton's reliance upon certain language of the appellate court in *Cowdrey v. City of Eastborough*, 730 F.2d 1376 (10th Cir. 1984), to demonstrate a conflict is unwarranted. The court, sitting en banc, reviewed and correctly articulated principles governing municipal liability, stating that an isolated incident "without more" cannot serve as a basis for liability. In this case, because there was demonstrated substantial evidence of more than an isolated incident, there exists no conflict with *Cowdrey v. City of Eastborough, supra*; rather, its reasoning supports the appellate court's decision here.

D. The Trial Court's Instruction Concerning Lawton's Liability Is Not Properly Before This Court Nor Worthy Of This Court's Review.

Lawton did not object to any instruction given by the trial court as required by Rule 51 of the Federal Rules of Civil Procedure. To the contrary, Lawton announced, "We have no objection to any of the instructions, your Honor." (Tr. 1635). Now Lawton, by including an instruction it claims is infirm and "begging this Court to read it," in its petition attempts to raise a belated objection to the instruction. This attempt must fail.

1. Rule 51 Requires That Lawton Have Made An Objection At Trial; Its Failure To Do So Precludes Review Here.

As this Court reaffirmed in *City of Oklahoma City v. Tuttle, supra*, Rule 51 requires that an objection to an instruction be made *at trial*. Failure to do so must waive the objection. Moreover, because Lawton failed to raise any error in the instruction before the appellate court, the instruction is not properly before this Court for review. To the contrary, Lawton argued on

appeal not that there was any infirmity with the instruction or that its liability even turned on a single incident, but that demonstrated multiple incidents of violence could not serve as an evidentiary predicate for Lawton's liability.

2. The Decision Below Was Correct, Notwithstanding The Giving Of An Instruction Which Referred To "Single Incident" Liability.

The infirmity identified by this Court in the instruction in *City of Oklahoma City v. Tuttle, supra*, an instruction admittedly very similar to the one given in this instance, is not present here. The jury returned a special verdict in which it independently found Lawton liable to two of the Lusby brothers on pendent state claims properly submitted[3] to it which did not require exclusive reliance on an arguably impermissible instruction. Thus, because there exists an independent, clearly discernible basis for the jury's verdict, reversal is not appropriate. The general verdict, fatal in *Tuttle*, was not used here.

As this Court stated in *Zant v. Stephens*, _____ U.S. _____, 103 S.Ct. 2733 (1983), when there is evidence in the record that the verdict did not rest exclusively on an impermissible portion of an instruction, the giving of the instruction need not mandate reversal. *Id.* at 2745. When there is no uncertainty that an independent basis existed, affirmance is permitted. *Id.* Here, where the verdict obtained from sufficient pendent state claims, review is not necessary; the result is clearly correct. Moreover, because in this case the arguably infirm instruction did not relate to constitutionally protected activity by petitioners as was present in *Stromberg v. California*, 283 U.S. 359 (1931), reversal is not required. *Zant v. Stephens*, _____ U.S. _____, 103 S.Ct. at 2746.

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[3] See Part II, *infra*.

Furthermore, in *Tuttle*, respondent's exclusive theory of recovery, lack of training, might have allowed liability to have been found solely on the basis of an inference drawn from a single incident. Here, because the jury was not required to "infer" the existence of any policy, much less a lack of training, as the predicate for liability, the infirmity does not exist. To the contrary, the articulated, conscious decisions made by municipal policymakers served as the permissible predicate on which the jury could find liability.

E. Lawton's Claim Of Prejudice Accruing From The Appellate Court's Articulation Of The Municipal Policy Which Created The Affirmative Link Between Lawton And The Constitutional Violation Is Not Supported By The Facts Nor The Law And Merits No Review.

Lawton asserts that the muncipal policy of non-investigation and delegation of a non-delegable duty articulated by the appellate court as the basis for its liability was not considered or litigated at trial. To the contrary, as set forth in the trial transcript, this policy and other questionable municipal policies were presented to the jury. That evidence could thus be a basis for affirmance, on appeal, of the jury verdict. "Jury findings on disputed matters of fact will be upheld by the reviewing court if substantial evidence exists to support them." *Control Components, Inc. v. Valtek, Inc.*, 609 F.2d 763 (5th Cir.), *cert. denied*, 449 U.S. 1022 (1980), citing *Kiva Corporation v. Baker Oil Tools, Inc.*, 412 F.2d 546 (5th Cir. 1969); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

Moreover, as set forth in Part I.A., *supra*, Lawton chose, in its brief on appeal, to challenge only the sufficiency of certain evidence in attempting to argue insufficiency of a series of prior and subsequent inci-

dents of violence and misconduct by Lawton police officers. Lawton's own limitation of the issue on appeal cannot limit the appellate court's review of the record or articulation of other competent evidence as the basis for Lawton's liability.

Lawton cannot seriously contend that no evidence of the articulated municipal policy was presented at trial; it rather seems to assert that, given a second opportunity at trial, it might prove to the jury that its policies were permissible. This plea for a second chance at challenging the Lusby brothers' competent evidence cannot be a basis for the granting of the requested writ.

Finally, Lawton's reliance on two cases, *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979), and *Armstrong Cork Co. v. Lyons*, 366 F.2d 206 (8th Cir. 1966), is misplaced. While those cases do contain language relevant to a claim of prejudice resulting from a shifting of the issues, the act of shifting of the issues which occasioned the claim of prejudice occurred at trial. Unlike those fact situations, Lawton is not faced with a shifting of the issues at trial or an amendment of the complaint by an opposing party but with appellate affirmance of a jury verdict based on its articulation of competent evidence submitted at trial but ignored by Lawton on appeal.

II. THE FACT QUESTION WHETHER THE LUSBY BROTHERS COMPLIED WITH STATE LAW REQUIREMENTS WAS PROPERLY DECIDED BELOW.

A. Lawton's Issue Is Purely Factual And Raises No Novel Or Controversial Federal Or Constitutional Question.

Lawton argues that the facts of this case do not present sufficient evidence that the Lusby brothers complied with the notice requirement of the Oklahoma Political Subdivision Tort Claims Act,

Okla.Stat. tit. 51, §151-170 (1981) (the "Tort Claims Act"). This argument does not merit review by this Court because it concerns admitted fact questions relating to compliance with state laws which implicate no constitutional or federal questions.

B. The Court Of Appeals Correctly Decided That, Under These Facts, The Lusby Brothers Had Substantially Complied With The Notice Requirement Of The Tort Claims Act.

In determining whether the Lusby brothers complied with the notice requirement of the Tort Claims Act, the question of fact is whether the Lusby brothers' actions constituted notice to Lawton. Review of the facts on which the appellate court premised its determination that the trial court was correct in its finding that the Lusby brothers had complied with the notice provision in light of the appropriate judicial interpretation demonstrates that the Lusby brothers "substantially complied" with the notice requirement. Moreover, because according to Oklahoma's interpretation of state law Lawton suffered no prejudice, the Tort Claims Act cannot be any bar to the pendent claims. *Duesterhaus v. City of Edmond*, 634 P.2d 720, 722 (Okla. 1981); *Reirdon v. Wilburton Board of Education*, 611 P.2d 239, 241 (Okla. 1980).

In evaluating this question, reasoning of the Supreme Court of the State of Oklahoma as to the Tort Claims Act must be noted:

> The object of the statute must be kept in mind, and it should not be given a construction which will defeat the ends of justice.

Reirdon v. Wilburton Board of Education, 611 P.2d at 241.

Such a construction comports with the purpose of the Tort Claims Act: to provide justice for the plaintiff

while preventing prejudice to the defendant. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. Here, until the date of dismissal of the charges, Lawton, because of its demand through its city prosecuting attorney that the Lusby brothers release all claims, was obviously aware of the monetary claim which became the substance of the lawsuit; within 120 days of that dismissal date the claims had not grown stale; prompt investigation and the preparation of a competent defense was possible; settlement discussions, had Lawton wished to undertake them, could easily have been initiated. There simply was no prejudice which accrued to Lawton as would permit a statutory bar here. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. The Lusby brothers have, according to the controlling authority of the Supreme Court of the State of Oklahoma, complied with the Tort Claims Act because there has been no prejudice to Lawton.

Moreover, not only is it clear that no prejudice resulted, but the Lusby brothers also have unquestionably substantially complied with the method of notice set forth in the statute as interpreted by the Supreme Court of the State of Oklahoma in *Duesterhaus v. City of Edmond, supra*, and *Reirdon v. Wilburton Board of Education, supra.*

The Lusby brothers provided verbal notification to the Lawton city prosecuting attorney that monetary relief was demanded in the negotiations concerning and ultimate refusal of the city prosecuting attorney's continued demand, not merely the demand of two police officers, to release their claims prior to the February 27, 1980, dismissal of the charges. Such verbal notice to the city prosecuting attorney and negotiation has *explicitly* been held to be substantial compliance by the Supreme Court of the State of Oklahoma. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. Written notice is simply not a requirement mandated by the Oklahoma Supreme Court.

Furthermore, the Lusby brothers' choice of verbal notice and their filing of a federal lawsuit cannot be said, considering the liberal construction given by the Oklahoma Supreme Court, to be less than substantial compliance with any written notice requirement which might survive *Duesterhaus v. City of Edmond, supra.* Again, the key factor here, as demonstrated by Oklahoma Supreme Court authority, is the lack of prejudice accruing to Lawton. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. The mandate of the Oklahoma Supreme Court has been met; there was substantial compliance with the notice requirement of the Tort Claims Act; there was no prejudice to Lawton.

Finally, Lawton's belated suggestion that this question be certified to the Oklahoma Supreme Court is inappropriate. The question is not a question of law which under the Oklahoma Statute[4] may be certified, but a question of fact which, because of abundant Oklahoma authority considered and cited by the trial and appellate courts in their review of the facts, need not be certified. *See Lehman Brothers v. Schein*, 416 U.S. 386, 388-89 (1974) (Rehnquist, J., concurring). Moreover, because the notice question would not aid the resolution of any constitutional claim, certification is not appropriate here. *Cf., Zant v. Stephens*, 456 U.S. 410, 416 (1982).

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[4] The Supreme Court and the Court of Criminal Appeals respectively may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Criminal Appeals of this state.

Okla.Stat. tit. 20, §1602 (1981).

III. T.G.&Y.'S ATTEMPT TO REARGUE EVIDENCE PRESENTED BELOW DOES NOT MERIT REVIEW BY THIS COURT.

A. T.G.&Y. Does Not Challenge The Submission Of Or Its Demonstrated Liability Founded On Pendent Claims, Thus Providing An Independent Basis For The Jury Verdict Which Precludes Review.

Because the jury specifically found, and T.G.&Y. does not challenge, its liability on various pendent state claims, including false arrest, as to all the Lusby brothers, should this Court question whether the §1983 liability was appropriate the result would still be the same. T.G.&Y. is liable to the Lusby brothers for damages as determined by the jury. Clearly, the petition for a writ of certiorari must be denied.

B. T.G.&Y.'s Issue Is Wholly Factual And Presents No Novel Question Or Conflict Of Law.

T.G.&Y. does not challenge the trial and appellate courts' findings that its employee, Gent, acted under color of law. Moreover, according to T.G.&.Y.'s *own* statement at page seven of its petition for a writ of certiorari, the only issue raised is whether, *under these facts*, T.G.&Y. can be said to have acted under color of law. Because the determination of this question depends on the unique facts attendant to the false arrest, incarceration and continued prosecution of the Lusby brothers and raises no question of law which would impact on future litigants, this case does not merit review by this Court.

T.G.&Y. attempts to present this case in the posture of findings of the appellate court, ignoring the fact that the appellate court's recitation of the evidence on which T.G.&Y.'s liability was predicated was based on substantial and competent evidence pre-

sented at the trial court level. The question whether T.G.&Y. acted under "color of law" was fully and completely considered at the trial court level; the facts adduced before the trial court support the determination that T.G.&Y. acted under "color of law."

T.G.&Y. merely argues there was no evidence supporting its willful participation in concerted activity. However, evidence to the contrary was demonstrated at trial. T.G.&Y. relied solely on the Lawton police force for training of its security guards. At trial T.G.&Y. explicitly admitted it had determined to hire *only* Lawton police officers as security guards. (Tr. 890). Testimony indicated that T.G.&Y. allowed one such Lawton police officer/security guard to virtually hire the other security guards. (Tr. 737). T.G.&Y.'s manager's own testimony indicated that no background check was performed. (Tr. 845, 846). According to T.G.&Y.'s own testimony it has maintained a policy whereby, during the arrests of shoplifters, members of the Lawton Police Department filled out citizen's arrest forms which should have been filled out by T.G.&Y. (Tr. 858, 859). No investigation of shoplifting was done by Lawton police officers at the time they were called to the store (Tr. 857, 858), nor was there even a requirement of T.G.&Y. by Lawton that all the proper forms be filled out at the time of arrest. T.G.&Y. successfully created a scenario in which it had authority to bring its own criminal charges by initiating a citizen's complaint because T.G.&Y. knew Lawton would not exercise any check on such charges. In this instance it was the very fact of Gent's status as a Lawton police officer and T.G.&Y.'s use of that status that created the scenario in which the Lusby brothers were officially incarcerated, physically abused and then maliciously prosecuted for more than seven months.

These facts, in addition to those articulated by the appellate court, support the trial court's finding and

the jury verdict. The authority cited by the appellate court clearly creates no conflict with the facts here, nor has T.G.&Y. raised any conflict with other established cases. Furthermore, the appellate court recognized, at n.5 of its opinion (App. A, p. 23a, T.G.&Y. petition), the apposite authority persuasive to its decision. *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir. 1980); *Duriso v. K-Mart*, 559 F.2d 1274, 1277 (5th Cir. 1977); *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93, 94-95 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 915 (1976); *Cf., White v. Scrivner Corp.*, 594 F.2d 140, 143-44 (5th Cir. 1979) (no color of law because police department had policy of independently investigating before making arrests for shoplifting).

Moreover, T.G.&Y.'s argument that its demand of a release of civil liability is a basis for a finding that it acted under color of law is erroneous. The Tenth Circuit found that T.G.&Y.'s demand of a release was one of the acts which caused the violation — not the act that created the "color of law" requirement. As the court stated:

> Acting under color of state law, T.G.&Y. violated the plaintiffs' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. The evidence suggested that T.G.&Y.'s policy was always to seek a release of liability as a condition for dropping criminal charges. T.G.&Y. even had a special form made up that required suspects to confess their guilt and release T.G.&Y., its officers and employees from all claims for damages.

App. A, p.13a, T.G.&Y. petition.

Additionally, T.G.&Y.'s apparent belief that the appellate court held that T.G.&Y. acted under color of law when it failed to dismiss charges against the Lusby brothers under an Oklahoma state statute which provides that a complaining party may, after satisfac-

tion, cause criminal charges to be dismissed is a misreading of the court's opinion. The abuse of the statute was not a basis for the "color of law" requirement; it was a basis for liability. Here T.G.&Y. has not contested its liability for the false arrest — only that it acted under color of law. Its insubstantial arguments challenging the finding of liability do not warrant review.

CONCLUSION

Because petitioners present only questions of fact bereft of any federal or constitutional questions of great import, and because the decision below is consistent with apposite rulings of this Court and circuit courts, the petitions for writs of certiorari must be denied.

Respectfully submitted,

JACK L. KINZIE
GRETCHEN A. HARRIS*

of

ANDREWS DAVIS LEGG BIXLER
MILSTEN & MURRAH
500 West Main
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-9241

and

LINDA G. SCOGGINS

of

SPRADLING, ALPERN, FRIOT
& GUM
101 Park Avenue, Suite 700
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-0211

Attorneys for Respondents

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* Counsel of Record